Nov 15 1876
3-321
Braddee 413
Totten
46 N.Y.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~290~~ 95

STEPHEN TALTY, PLAINTIFF IN ERROR,

vs.

THE FREEDMAN'S SAVINGS AND TRUST COMPANY.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 6, 1874.

Nov 14 1876
Jas Sharpe

SUPREME COURT OF THE UNITED STATES.

No. 290.

STEPHEN TALTY, PLAINTIFF IN ERROR,

vs.

THE FREEDMAN'S SAVINGS AND TRUST COMPANY.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Writ of error bond	2	1
Writ of error	3	2
Declaration	4	2
Affidavit with declaration	6	3
Undertaking	7	3
Writ of replevin	8	4
Marshal's return	9	4
Defendant's pleas	11	5
Joinder of issue	13	5
Note of issue	13	6
Proceedings of circuit court	14	6
Motion for new trial	17	7
Proceedings of circuit court on second trial	18	7
Motion for new trial, &c	21	8
Bill of exceptions	23	9
Dismissal of motions	33	12
Proceedings of court in general term	34	12
Clerk's certificate	36	13

2 In the supreme court of the District of Columbia, the 30th day of June, 1874.

STEPHEN TALTY
vs.
THE FREEDMAN'S SAVINGS AND TRUST COMPANY. } At law, No. 9470. In error.

Know all men by these presents that we, Stephen Talty, Patrick Herlihy, and John J. Sullivan, are bound unto the above-named defendant in the sum of nine thousand dollars, current money of the United States, to be paid to the said defendant, or its assignees, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 30th day of June, 1874.

Whereas the above-named Stephen Talty hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Stephen Talty shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

STEPHEN TALTY. [SEAL.]
PATRICK HERLIHY. [SEAL.]
JOHN J. SULLIVAN. [SEAL.]

Sealed and delivered in presence of—
A. B. DUVALL.

Approved:

A. WYLIE.

DISTRICT OF COLUMBIA, *to wit:*

I, J. J. Sullivan, make oath that I am worth the sum of nine thousand dollars over and above my just debts and liabilities.

J. J. SULLIVAN.

Subscribed and sworn to before me this 8th of Aug., 1874.

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Asst. Clerk.

I, Patrick Herlihy, make oath that I am worth the sum of nine thousand dollars over and above my just debts and liabilities.

PATRICK HERLIHY.

Subscribed and sworn to before me this 12th of Aug., 1874.

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Asst. Clerk.

AUG. 13, 1874.

Filed by consent of parties plaintiff and defendant now for then, upon condition that plaintiff speed the cause.

ENOCH TOTTEN,
Atty. for Deft.
JOS. H. BRADLEY, JR.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief-justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between Stephen Talty, plaintiff, and the Freedmen's Savings and Trust Company, defendant, No. 9470, a manifest error hath happened, to the great damage of the said Stephen Talty, as by his complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the United States, this 12th day of August, in the year of our Lord 1874, and of the Independence of the United States the 99.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To the Freedmen's Savings & Trust Company:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Stephen Talty is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief-justice of the said supreme court of the District of Columbia.

Service acknowledged this 12th day of August, 1874.

ENOCH TOTTEN,
Atty. for App'lee.

4 The answer of the chief-justice and justices of the supreme court of the District of Columbia within named.

The record and proceedings whereof mention is within made follow in these words, to wit:

Declaration.—(*Filed March* 14, 1872.)

In the supreme court of the District of Columbia.

STEPHEN TALTY
v.
THE FREEDMAN'S SAVINGS AND TRUST COMPANY. } At law, No. 9470.

The plaintiff sues the defendant, a corporation duly incorporated by

an act of the Congress of the United States, for unjustly detaining his, said plaintiff's, goods and chattels, to wit: "A claim against the
5 corporation of Washington, in said District of Columbia, which was duly approved by the committee of indebtedness of the house of delegates, and passed by the legislative assembly, for $6,096.75, being register number six hundred and five, (605,)" of the value of six thousand ninety-six $\frac{75}{100}$ dollars.

And the plaintiff claims that the same be taken from the defendant and delivered to him; or, if it is eloigned, that he may have judgment of its said value and all mesne profits and damages, which he estimates at $6,096.75, besides costs.

BRADLEY & BRADLEY,
Attys. for Pltff.

The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise judgment.

BRADLEY & BRADLEY,
Attys. for Pltff.

6 *Affidavit filed with narr.*

In the supreme court of the District of Columbia.

STEPHEN TALTY
vs.
THE FREEDMAN'S SAVINGS AND TRUST COMPANY. } At law, No.

The plaintiff makes oath that, according to his information and belief, he is entitled to recover possession of the chattle proposed to be replevied in this action, being the same described in the declaration, to wit, "a claim against the corporation of Washington, in said District of Columbia, which was duly approved by the committee of indebtedness of the house of delegates, and passed by the legislative assembly, for $6,096.75, being register No. 605."

That the defendant detains the same, and that said chattle was not subject to such detention, and was not taken upon any writ of replevin by the defendant.

STEPHEN TALTY.

7 Subscribed and sworn to before me.

R. J. MEIGS, *Clerk*,
By CHS. McNAMEE,
Asst. Clk.

Undertaking.—(*Filed March* 14, 1871.)

In the supreme court of the District of Columbia.

STEPHEN TALTY
v.
THE FREEDMAN'S SAVINGS AND TRUST COMPANY. } At law, No 9490.

The plaintiff and J. H. Crossman, his surety, appear, and, submitting

to the jurisdiction of the court, hereby undertake, for themselves and each of them, their and each of their heirs, executors, and administrators, to abide by and perform the judgment of the court in the premises, which judgment may be rendered against all of us.

8 STEPHEN TALTY. [SEAL.]
J. H. CROSSMAN. [SEAL.]

Approved 14 March, 1872.

R. J. MEIGS, *Clerk*,
By CHAS. McNAMEE,
Asst. Clerk.

Writ of replevin.—(*Issued March* 14, 1872.)

In the supreme court of the District of Columbia, the 14 day of March, 1872.

STEPHEN TALTY, PLTFF.,
v.
THE FREEDMAN'S SAVINGS AND TRUST COMPANY, deft. } At law, No. 9470.

The President of the United States to the marshal for said District, greeting:

The plaintiff in this action having found sufficient sureties to prosecute the same, you are therefore hereby commanded to take the goods and chattels claimed by the plaintiff, to wit, "a claim against the
9 corporation of Washington, in said District of Columbia, which was duly approved by the committee of indebtedness of the house of delegates, and passed by the legislative assembly, for $6,096.75, being register number six hundred and five, (605,) from the defendant, and deliver the same to the plaintiff, and warn the defendant to appear in said court at the first special term thereof occurring twenty days after service of this writ, and answer said action; and that if he make default in so doing, the plaintiff may proceed to judgment at the trial-term of the court next after service of this writ.

Witness D. K. Cartter, chief-justice of said court.

[SEAL OF COURT.] R. J. MEIGS, *Clerk.*

B & B.

On back:

Replevied and delivered as per schedule and receipt, and
10 served copies of summons and declaration on D. L. Eaton, actuary, March 14, 1872.

ALEXANDER SHARP,
U. S. Marshal of D. C.

Received of Alex'r Sharp, U. S. marshal, D. C., the bond or acct. named in the within schedule, March 15th, 1872.

STEPHEN TALTY.

Schedule.

STEPHEN TALTY
v.
THE FREEDMAN'S SAVINGS AND TRUST COMPANY. } No. 9470. Replevin. Schedule.

"A claim against the corporation of Washington, in said District of Columbia, which was duly approved by the committee of indebtedness of the house of delegates, and passed by the legislative assembly, for $6,096.75, being register No. 605."

We, the undersigned citizens of the District of Col., having been
11 duly summoned and sworn by the marshal of said District, do appraise the bond or acct. named in the above schedule to the sum of fifty-four hundred and eighty-seven $\frac{08}{100}$ dolls.

Witness our hands and seals this 15th day of March, 1872.

C. A. ZIMMERMAN. [SEAL.]
RYLARD RUFF. [SEAL.]
PHILIP M. JONES. [SEAL.]

Defendant's pleas.—(*Filed April* 29, 1872.)

In the supreme court of the District of Columbia, April 29, 1872.

STEPHEN TALTY, PLAINTIFF,
v.
THE FREEDMAN'S SAVINGS AND TRUST COMPANY, defendant. } At law, No. 9470.

1. For a first plea, the defendant says it is not guilty of detaining the plaintiff's goods and chattels as alleged.

12 2. And for a further plea, the defendant says that the said "claim against the corporation of Washington, in said District of Columbia," referred to in the plaintiff's complaint, and to recover the possession of which he brought this suit, is not the property of the plaintiff, and that he is not entitled, either in law or equity, to the possession thereof.

3. And for a further plea, the defendant says that the said claim was at the time this suit was commenced, and is now, the property of this defendant.

4. The defendant claims that the said "claim" has been unjustly taken from it in this case, and prays judgment that the same be returned; or, if it be eloigned, that the defendant may have judgment of its value and all mesne profits and damages, which is estimated at $7,000, besides costs.

HINKLE AND ARRICK,
Attys. for Defendant.

13 *Joinder of issue*—(*Filed May* 2, 1872.)

In the supreme court of the District of Columbia.

STEPHEN TALTY
v.
THE FREEDMAN'S SAVINGS AND TRUST COMPANY. } At law, No. 9470.

The plaintiff joins issue upon the defendant's pleas.

BRADLEY & BRADLEY,
Plff.'s Attys.

Note of issue.—(*Filed May* 2, 1872.)

In the supreme court of the District of Columbia.

STEPHEN TALTY
v.
THE FREEDMAN'S SAVINGS AND TRUST COMpany. } At law, No. 9470.

Bradley & Bradley, plff.'s atty.'; Hinkle & Arrington, deft.'s attys.

14 Last pleading filed in above case May 2d, 1872.
BRADLEY & BRADLEY,
Plff.'s Attys.

To the clerk.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing of the fourth Monday, 27th day, of January, A. D. 1873.

MONDAY, *January 27th*, 1873.

By order of Chief-Justice Cartter, presiding, the court is opened by proclamation of the marshal, pursuant to the rule of court.

THURSDAY, *March* 13, 1873.

Session resumed pursuant to adjournment, Chief-Justice Cartter presiding.

15 STEPHEN TALTY, PLFF.,
v.
THE FREEDMAN'S SAVINGS AND TRUST COMpany, deft. } At law, No. 9470. Cal. 130.

And now come here as well the plaintiff, by his attorneys, Messrs. Bradley, as the defendant, by its attorney, Mr. Totten, and a jury of good and lawful men of this District, to wit, John Van Riswick, Michael Duffey, Columbus Alexander, Henry Coburn, George Becker, James R. Harrover, Robert A. Griffin, Robert Toleaferro, George Neitzey, Columbus O. Wall, Daniel W. Bills, and James M. Terrell, who, being sworn to try the issue above joined, are respited until the meeting of the court to-morrow.

FRIDAY, *March* 14, 1873.

Session resumed pursuant to adjournment, Chief-Justice Cartter presiding.

STEPHEN TALTY, PLFF.,
v.
16 THE FREEDMAN'S SAVINGS AND TRUST Company, dett. } At law, No. 9470. Cal., 130.

And now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the case is given them in charge, retire to their room in charge of a ba'liff to consider of their verdict.

SATURDAY, *March* 15*th*, 1873.

Session resumed pursuant to adjournment, Chief-Justice Cartter presiding.

STEPHEN TALTY, PLFF.,
v.
THE FREEDMAN'S SAVINGS AND TRUST COMPANY, deft. } At law, No. 9470. Cal., 130.

And now again come here the parties aforesaid, in manner aforesaid, and the same jury return into court, and on their oath say they find the issue aforesaid in favor of the plaintiff, and assess his damages
17 by reason of the premises at the sum of one cent, besides costs. Therefore, it is considered that the plaintiff recover against said defendant said sum of one cent for his damages, as aforesaid assessed, and $35.85 costs of suit, and have execution thereof.

And thereupon the defendant, by its said attorney, moves the court for a new trial, and assigne*s* the following causes :

1. Because the verdict is unreasonable.
2. Because the evidence is insufficient to support the verdict.
3. Because the verdict is contrary to the evidence.
4. Because the verdict is contrary to the instructions of the court and contrary to law.

SATURDAY, *March* 22, 1873.

Session resumed pursuant to adjournment, Chief-Justice Cartter presiding.

STEPHEN TALTY, PLFF.,
v.
18 THE FREEDMAN'S SAVINGS AND TRUST Company, deft. } At law, No. 9470. Cal., 130.

Upon argument of the defendant's motion for a new trial, it is considered that the verdict and judgment entered in this case be, and the same are hereby, set aside, and a new trial granted, the defendant to pay the costs of the trial.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing on the third Monday, 20 day, of October, A. D. 1873.

MONDAY, *October* 20*th*, *A. D.* 1873.

By order of MacArthur, justice, presiding, the court is opened by proclamation of the marshal, pursuant to the rule of the court.

19 MONDAY, *December* 8, 1873.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

STEPHEN TALTY, PLFF.,
v.
THE FREEDMAN'S SAVINGS AND TRUST COMPANY, deft. } At law, No. 9470. Cal., 46.

And now comes here as well the plaintiff, by his attorneys, Messrs.

Bradley, as the defendant, by its attorney, Mr. Totten, and another jury of good and lawful men of this District, to wit, William C. Harper, Francis Mattingly, Joseph S. Boss, Wesley J. Scott, Hanibal C. Addison, John H. Cunningham, Charles Medford, Peter H. Heller, John Crowley, John W. Coon, Samuel Fowler, and Luke Bolles, who, being sworn to try the issue above joined, are respited until the meeting of the court to-morrow.

20 TUESDAY, *December* 9, 1873.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

STEPHEN TALTY, PLFF.,
v.
THE FREEDMAN'S SAVINGS AND TRUST COMpany, deft. } At law, No. 9470. Cal., 46.

And now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the case is given them in charge, on their oath say they find the issue aforesaid in favor of the defendant, and assess its damages by reason of the premises at the sum of six thousand and ninety-six dollars and seventy-five cents, besides costs. Therefore, it is considered that the plaintiff return to the defendant the property replevied, with damages, or, in default, that the defendant recover against the plaintiff and J. H. Crossman, his surety, said sum of six thousand and ninety-six dollars and
21 seventy-five cents for its damages as aforesaid assessed, and $75.65 costs of suit, and have execution thereof.

Motion for new trial, &c.—(*Filed Dec.* 11, 1873.)

In the supreme court of the District of Columbia.

STEPHEN TALTY
v.
THE FREEDMAN'S SAVINGS AND TRUST COMpany. } At law, No. 9470.

And now comes the plaintiff, by his attorney, Joseph H. Bradley, jr., and moves the court in arrest of judgment, and also for a new trial, and also to set aside the verdict—

1st. Because the verdict of the jury is not in conformity with the law.
2d. Because the verdict of the jury is against the law and the evidence.
22 3d. Because of misdirection by the court of the law to the jury.
4th. Upon bills of exceptions.

JOS. H. BRADLEY, JR.,
Atty. for Plff.

SATURDAY, *January* 3, 1874.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

STEPHEN TALTY, PLFF.,
v.
THE FREEDMAN'S SAVINGS AND TRUST COMpany, deft. } At law, No. 9470.

And now again come here as well the plaintiff as the defendant, by

their respective attorneys, whereupon the plaintiff's motion for a new trial is overruled, from which decision the plaintiff prays an appeal to the general term.

And thereupon the plaintiff files his bills of exceptions to the
23 rulings of the court on the trial, duly signed and sealed, and prays that they may be made a part of the record, which is accordingly done.

Bill of exceptions.

In the supreme court of the District of Columbia.

STEPHEN TALTY
vs.
THE FREEDMAN'S SAVINGS AND TRUST COMPANY. } At law, No. 9470.

On the trial of this cause the plaintiff, to maintain the issue on his part joined, gave evidence tending to show and to prove that on the sixth day of January, in the year eighteen hundred and seventy-two, the plaintiff was the owner of a certain claim for which he held certain papers in the words and figures following, set:

"SURVEYOR'S OFFICE OF THE DIST. OF COLUMBIA,
"*Washington, D. C., Dec.* 9, 1871.

24 "*The corporation of Washington to Stephen Talty, Dr.*

"To grading and gravel'g I street north from 7 east to the eastern boundary of the city, in accordance with an act of the corporation app'd Jan'y 22, 1870, and the contract dated January 3d, 1871, viz:

21,099 cubic yds., @ 17 cts. per yd	$3,586 83
13,944 sq. yds. gravel, @ 18 cts. per sqr. yd	2,509 92
	$6,096 75

Duplicate.
(Signed) WM. FORSYTH,
Surveyor of the District of Columbia.

(Endorsed:) Stephen Talty.

Office of the auditing commission appointed under the act of the legislative assembly, approved June 16, A. D. 1871.

WASHINGTON, D. C., *Dec.* 11*th*, 1871.

Received of Stephen Talty, of Washington, a claim against the corporation of Washington, contract completed, together with one
25 voucher; register No., 605; amount, $6,096.75.
(Stamped:) Aud'g com'n.
(Signed) ED. M. FAETZ,
For Clerk.

(Endorsed:) Stephen Talty.

Claim No. 605, in favor of Stephen Talty, for $6,096.75, (six thousand

and ninety-six $\frac{75}{100}$ dolls.,) has been examined and approved by the commission to audit the same.

Ja'y 4, '72.

(Signed) A. S. PRATT,
Chm. Com'n.

That on the said 6th day of January the plaintiff employed one M. N. H. Kendig to borrow for him the sum of $3,000 for 60 days, and, at the suggestion of the said Kendig, delivered to him the papers aforesaid as collateral security for the payment of a promissory note in the words following, but erroneously dated A. D. 1871 instead of A. D. 1872:

$3,000. WASHINGTON, D. C., *Jan'y* 6, 1871.

26 Sixty days after date I promise to pay to the order of myself (voucher $6,096.75, coll.) three thousand dollars, at the First National Bank of Washington, D. C., value received, with $\frac{10}{100}$ int.

(Signed) STEPHEN TALTY.

[$1.50 stamp.]

(Endorsed:) Due March 6–9. Stephen Talty.

That said Kendig took the said note and the said collaterals away with him, and shortly thereafter, on the same day with the date of said note, returned and paid over to the plaintiff the amount of said note less the discount thereon at the rate of ten per centum per annum; that the express understanding and agreement between the plaintiff and the said Kendig was that if the plaintiff failed to pay his said note at its maturity, the said Kendig should have the right to buy said collateral at the rate of 90 cents in the dollar, if he so desired; that before the said note had matured, the plaintiff ascertained the said Kendig
27 had taken up his said note, and a day or two before it matured the plaintiff, to pay his note and obtain his collaterals, called to see said Kendig and offered to pay said note, and demanded its surrender, together with said collaterals, but the said Kendig would not accept such payment, and refused to deliver said note or said collaterals; that the plaintiff further ascertained that said Kendig had, without his, plaintiff's, knowledge or authority, sold said collaterals to D. L. Eaton, now deceased, the then actuary of the defendant, for 96 cents on the dollar, on or about the 26th day of January, A. D. 1872, and said Kendig had taken up said note on the 1st day of February, A. D. 1872, and still held the same; that said actuary had presented said collaterals to the chairman of the committee of indebtedness of the house of delegates, D. C., on said 26th day of January, and
28 received from him said claim, No. 605, and executed a receipt therefor in the words and figures following, sct:

Received of Frederick A. Boswell, chairman of the committee of indebtedness of the house of delegates, D. C., claim No. 605, which was duly approved by said committee and passed by the legislative assembly, for $6,096.75.

(Signed) D. L. EATON,
Actuary, Assignee.

JAN. 26TH, 1872.

That he caused his duly authorised agent to demand of the said ac-

tuary the surrender of his said claim to him, which demand was refused by said actuary, and thereupon the plaintiff brought this suit; that subsequently he collected the whole amount of his claim and executed a receipt therefor in the words and figures following, sct:

AUDITOR'S OFFICE,
Washington, D. C., May 3d, 1872.

City of Washington, of District of Columbia, to Stephen Talty, Dr.

29 To claim No. 605, as approved by the commission to audit the "outstanding indebtedness of the corporations of Washington, Georgetown, and levy court," and in accordance with the act of the legislative assembly approved Aug. 23, 1871, defining the duties of the auditor, for grading and gravelling I street north from 7 street east to the eastern boundary:

Amount of claim	$6,096 75
Interest from June 15, '71, at 6 per cent	338 36
Total	$6,6435 11

Received payment from the commissioners of the "sinking fund" of the District of Columbia.

(Signed) STEPHEN TALTY.

And the plaintiff here rested his case.

The said defendant, in its behalf, gave evidence to the jury tending to show that when said collateral voucher was pledged by said plaintiff to said Kendig it was agreed, by and between said Kendig
30 and said plaintiff, that said Kendig might, if he should so elect, sell or take the said voucher at ninety cents on the dollar at any time before the maturity of the said note, and that said Kendig did elect to sell the said collateral voucher, and out of the proceeds of such sale took up the said note, and afterwards offered to pay the balance of the proceeds of the voucher, computed as aforesaid at ninety cents on the dollar, to said plaintiff before the maturity of said note, and that said plaintiff refused to take or accept the said money. And the said Kendig also testified as follows:

Question. The only transaction between yourself, as you claim it, was a transaction between yourself and the Freedman's Bank; was simply the sale of the collateral?

Answer. Yes, sir.

Question. You claim to be its owner?

Answer. Yes sir.

31 Question. Did you say anything to Colonel Eaton about *about* your transaction with Mr. Talty?

Answer. No, sir; not that I know of.

Question. You did not tell him how you came by it, from whom you got it, or what you paid for it, or what you had to do with it?

Answer. No, sir; I certainly never told him what I paid for it.

And that no tender of any kind was made by the plaintiff to the defendant before the commencement of this suit.

And that said Kendig was a broker and negotiator of loans at the time of the pledge to him, and that it was understood at the time by

said plaintiff that he, said Kendig, did not have the money himself, but must procure the same for said plaintiff on the note and said col-
32 lateral security from some other person, and that said Kendig received no commission or compensation from the plaintiff for his services, but relied for his compensation upon the option given to him by plaintiff to sell or take said voucher at ninety cents, as aforesaid, thus getting the benefit of the rise in the market, if any should occur; that he sold the said voucher to the defendant at 96 cents on the dollar, and afterwards, and before the maturity of the said note, the said Kendig told the plaintiff he had so sold said voucher, and offered to account with him therefor at 90 cents in the dollar, which offer the plaintiff rejected.

And after all the evidence in the cause had closed, the court charged the jury as follows: "Gentlemen of the jury, you may return your verdict for the defendant in this case. The verdict will be that the defendant is entitled to a return of the property replevied, or to its full value, and you will assess its value at what you think has been
33 proved to be its value in the market." To which charge, and to each and every part thereof, the plaintiff excepts, and prays the court to sign, seal, and cause to be enrolled this his first bill of exceptions, which is done accordingly, this 3d day of January, A. D. 1874, now for then.

ARTHUR MACARTHUR, [SEAL.]
Justice.

Dismissal of motions.—(*Filed January* 14, 1874.)

In the supreme court of the District of Columbia.

STEPHEN TALTY
v.
THE FREEDMAN'S SAVINGS AND TRUST COMPANY. } At law, No. 9470.

R. J. MEIGS, Esq., *Clerk, &c.:*

You will please enter the motions filed by the plaintiff to set
34 aside the verdict and in arrest of judgment dismissed.
14 Jan'y, 1874.

JOS. H. BRADLEY, JR.,
Plff.'s Atty.

Proceedings before the supreme court of the District of Columbia, in general term, commencing the third Monday, the 20th, of April, 1874; present, Justices Olin, Wylie, Humphreys, and MacArthur; absent, Chief-Justice Cartter, holding the circuit court.

MONDAY, *May* 4, 1874.

Session resumed pursuant to adjournment, Chief-Justice Cartter and Justices Olin, Wylie, Humphreys, and MacArthur present.

STEPHEN TALTY, PLAINTIFF,
vs.
THE FREEDMAN'S SAVINGS AND TRUST COMPANY, defendant. } At law, No. 9470.

35 Cause argued by Messrs. Bradley and Riddle for plaintiff, and by Mr. Totten for defendant, and submitted to court.

SATURDAY, *June* 6, 1874.

Session resumed pursuant to adjournment. Present, justices Olin, Wylie, Humphreys, and MacArthur.

STEPHEN TALTY, PLFF.,
v.
THE FREEDMAN'S SAVINGS AND TRUST COMPANY, defendant. } At law, No. 9470.

And now come here as well the plaintiff as the defendant, in manner aforesaid, and thereupon, because it appears to the court that there is no error in the record and proceedings of the circuit court, nor in its judgment, therefore it is considered that the judgment of the circuit court be, and the same is, affirmed, and that the defendant recover
36 against the plaintiff the costs of this proceeding, and have execution thereof.

OFFICE OF THE CLERK OF THE SUPREME COURT
OF THE DISTRICT OF COLUMBIA,
September 28th, A. D. 1874.

I certify that the foregoing is truly copied from originals on file and of record in this office, which originals together constitute the record and proceedings of the said supreme court of the District of Columbia in the case mentioned in *in* the writ of error to which this certificate is annexed.

Witness my hand and the seal of said court the day and year aforesaid.

[SEAL.] R. J. MEIGS, *Clerk.*

(Indorsement on cover:) No. 290. Stephen Talty, plaintiff in error, vs. The Freedmen's Savings and Trust Company. District of Columbia sup. court. Filed 6th October, 1874.

In the Supreme Court of the U. S.

OCTOBER TERM 1876.

STEPHEN TALTY,
vs.
THE FREEDMAN'S TRUST AND SAVING COMPANY. } No. 93.

This is a writ of error to the Supreme Court of the District of Columbia.

The case below was replevin brought by plaintiff, Talty, to recover from the defendant the "plaintiffs' goods and chattles, to wit: A claim against the corporation of Washington in said District of Columbia, which was duly approved by the committee of indebtedness of the House of Delegates, and passed by the Legislative Assembly, for $6,096.75, being register No. 605 of the value of six thousand ninety-six $\frac{75}{100}$ dollars."

The pleading appears to be regular.

On the trial evidence was given to sh ow the origin of the claim, its progress, and final allowance (pp. 9 and 10 record); that Talty needing money, employed M. N. Kendig to raise the sum of $3,000 for sixty days, on his, Talty's promissory note for that amount, bearing ten per cent. interest, the vouchers for this claim to be deposited as security for said note. A note was accordingly prepared by Talty payable to his own order, on the face, and in the body of which these words are written: [Vouchers $6,096.75 coll,] (see p. 10.) "It was under-

stood at the time by said plaintiff that he, Kendig, did not have the money himself, but must procure the same for said plaintiff on the note, and said collateral security from some other person, (p 11, 12); Talty endorsed his name on the back of the collateral and on the said note; and delivered them to Kendig, and on the same day Kendig paid over to him the amount of the note, less the discount. (p. 10.)

So far the parties agree: This was on the 6th January, 1871. On the 26th January '71, Kendig sold this collateral to the defendants at 96 cents on the dollar; they presented it to the proper authorities and received the vouchers mentioned in the declaration. On discovering this Talty demanded the voucher from the defendants, and this being refused brought this action.

The plaintiff and defendant's proofs here separate. The plaintiff sets up an agreement with Kendig at the time he employed him, to the effect that if he did not pay his said note at maturity he, Kendig, might take the said voucher at ninety cents in the dollar; that before the note became due, and shortly after the sale of the collateral by Kendig to defendants, he, the plaintiff, having heard that Kendig had taken up the note and then held it, called upon him and offered to pay the note, and demanded the return of the note and collateral. which Kendig refused, and this before he heard where the securities were.

The defendants set up, (p. 11,) that the agreement was that Kendig should, if he should so elect, sell or take the said voucher at ninety cents on the dollar at any time before the maturity of said note, and that he did elect to sell, and out of the proceeds of sale took up the note and offered to pay the balance to the plaintiff before the maturity of the note, and plaintiff refused to accept the money; that Kendig was a broker, received no compen-

sation for his services, but relied on this agreement for his compensation. Thus a direct conflict of evidence was raised between the parties.

The Court, of its own motion, instructed the jury as follows:

"Gentlemen of the Jury: You may return your verdict for the defendant in this case. The verdict will be that the defendant is *entitled to a return of the property replevied*, or its full value, and you will assess its value at what you think has been proved to be its real value in the market."

To this charge the plaintiff excepted; and this is the only subject of inquiry on this writ of error, and the plaintiff-in-error will maintain—

I.

That the judge erred in taking the cause from the jury when there was a conflict in the evidence touching the rights of the parties under the issues.

Walter *v.* Alexander, 2 Gill., 204; Cole *v.* Hebb, 7 G. & J., 28 *et seq.;* Bank of Washington *v.* Triplett, 1 Peters, 25; Jewell *v.* Jewell, 1 How., 210.

II.

The chattel replevied was a mere chose in action, and was not assigned by the owner. An indorsement of the owner's name on the back of the paper did not transfer, at law, any title to it.

III.

If the testimony for the plaintiff was true, and it was for the jury alone to find that, Kendig took no title to or interest in the collateral, except the option to purchase it if the note was not paid.

IV.

If the jury believed the plaintiff's testimony, no tender or offer to pay defendant was necessary.

Wilson *v.* Little and others, 2 Coms., 443.

V.

If the jury believed that evidence, Kendig took a naked authority to raise money on the note for the plaintiff, and the face of the note of itself shows that was the extent of his authority, (voucher $6,096.75 coll,) and so the parties treated it. It was for the jury to find how, after the note had been discounted on these collaterals alone, Kendig obtained and sold the collaterals.

All these were questions touching the credibility and weight of evidence, being the peculiar province of the jury, and the consideration of them was withdrawn by the court.

JOS. H. BRADLEY,
Plaintiff's Attorney.

IN THE

Supreme Court of the United States.

No. 93.—October Term, 1876.

Stephen Talty, Plaintiff in Error, *vs.* The Freedman's Savings & Trust Company.	Writ of error to the Supreme Court of the District of Columbia.

BRIEF FOR DEFENDANT IN ERROR.

The plaintiff in error sued out a writ of replevin in the Supreme Court of the District of Columbia, for the purpose of recovering the possession of an approved voucher, issued to the plaintiff by the authority of the corporation of the City of Washington, for labor performed and material furnished in grading and graveling one of the public streets of that city in 1871. The amount for which the voucher was issued and approved was $6,096.75.

The plaintiff being desirous of obtaining a loan of money in the early part of the year 1872, employed M. H. N. Kendig, who was a broker and negotiator of loans, to borrow for him the sum of three thousand dollars for the period of sixty days. To enable Kendig to procure the money for him, the plaintiff, on the 6th day of January, 1872, made his promissory note, payable to his own order in sixty days, for that sum of money, and endorsed and delivered it to Kendig; with it he delivered the approved

voucher before described, to be pledged by Kendig as collateral security for the payment of the note. The voucher was endorsed in blank by the plaintiff. On the same day Kendig procured the money, and delivered it, less the discount, to the plaintiff.

At the time Talty employed Kendig to negotiate the loan, it was understood that Kendig did not have the money himself, and that he must procure it, by using as collateral the note and pledge, from some third person. The plaintiff untertakes to prove that at the time of the transaction it was agreed between him and his broker that if the note should not be paid at maturity, then the broker might take the voucher so pledged, at the rate of ninety cents on the dollar. The defendant, however, contended that the agreement was that Kendig might, if he should so elect, take the pledged voucher at any time before the maturity of the note, at the rate mentioned. Kendig was not paid anything by the plaintiff, by way of commission or otherwise, for his services in consummating the loan.

Before the note became due, and on the 26th day of January, 1872, Kendig sold the voucher to the defendant at the rate of ninety-six cents on the dollar, but without informing the actuary of the Trust Company of the circumstances which brought it into his possession. On or before the first of February, 1872, with the proceeds derived from such sale, he took up the note and retained it in his own hands. Soon afterwards, and before the maturity of the note, he offered to pay to the plaintiff the proceeds of the voucher, computed at ninety cents, after having first deducted the amount of the promissory note, but the plaintiff refused to receive the money. Afterwards, and within a day or two of the maturity of the note, the plaintiff called on Kendig and offered to pay the note and demanded the surrender of the note as well as of the voucher which had been pledged for its payment; Kendig told him that he had sold the voucher to the defendant and offered to account with him therefor, at the rate of ninety cents on the dollar, accord-

ing to his view of the agreement, but plaintiff rejected the offer. The plaintiff, before suing out the writ of replevin in the cause, sent his agent to the defendant, who demanded the surrender of the voucher, but with this demand the defendant refused to comply. No tender of money was ever made by him to the defendant, nor did he offer to pay the defendant anything for the pledge or on account of the note. On the 14th day of March, 1872, the writ of replevin was sued out, and the pledge on the same day was taken from the defendant and was, by the marshal, delivered to the plaintiff. Subsequently, and on the 3d day of May, 1872, the plaintiff received from the commissioners of the sinking fund of the District of Columbia, the whole amount of the voucher, principal and interest, amounting altogether to the sum of $6,435.11.

To the declaration in replevin the defendant pleaded not guilty, and also asserted title in itself; upon which pleas issue was joined, and the cause came on regularly for trial in the circuit court.

At the close of the evidence on the trial, the court instructed the jury to return a verdict for the defendant. The verdict was so rendered, and the damages were assessed at $6,096.75.

Upon this verdict judgment was entered, and the plaintiff appealed to the General Term, when the judgment of the circuit court was affirmed. And now the cause is here on a writ of error by the plaintiff.

Points and Authorities.

First. The question upon which this cause was decided by the court below, both at the circuit and in general term, was upon the necessity of a tender on the part of the plaintiff to the defendant, before the institution of the suit, of the amount due from the plaintiff on his note.

It was not pretended that the plaintiff, before suing out his writ of replevin, or at any other time, made tender to

the defendant of any money, or even that he made any offer to pay the defendaut the amount of money he had borrowed upon the faith of the voucher.

Even if the plaintiff's version of the agreement with his broker be the correct one, still a tender was necessary to entitle the plaintiff to the possession of the property. The absolute sale made by the pledgee transferred all his rights. The fact of an absolute, unauthorized sale having been made by a pledgee relieves the pledgor from the necessity of a previous tender in an action of trover against such pledgee. But this is because the pledgor has voluntarily put it out of his power to restore the thing pledged.—(*Wilson vs. Little*, 2 N. Y., 449.) And it does not entitle the borrower to the possession of the goods without performance of the contract on his part; nor does the rule of exemption as to tender apply in a suit against a *bona fide* purchaser for possession of the pledge. Hence, if the voucher was endorsed and delivered, as a pledge or pawn, and not for the purpose of sale, the defendant by the purchase took all the interest the broker or pawnee possessed before the sale was made, and was entitled to all his rights. The broker would clearly have had the right to retain the possession of the voucher until the debt which it secured had been paid. Therefore, upon the case contended for by the plaintiff he could not maintain replevin for the voucher until he had first made to the *bona fide* holder of the property a tender of the amount due from him on account of the note.—(*Demainbray vs. Metcalf*, 2 Vernon, 691; *Little vs. Baker*, Hoff. Ch., 487; *Jarvis vs. Rogers*, 15 Mass., 408; *Baldwin vs. Ely*, 9 How., 580; 3 Parsons on Con., 274; Story on Bailments, § 327; *Lewis vs. Mott*, 36 N. Y., 395; *Donald vs. Suckling*, Law Rep., 1 Q. B., 585; *Johnson vs. Stear*, 15 C. B. (N. S.), 330.)

Second. There was no dispute about the fact that the plaintiff did not make a tender of any kind to the defendant. The right to maintain the action, therefore, was

a pure question of law, and belonged to the court exclusively. It was entirely immaterial what the facts were concerning the agreement between the plaintiff and Kendig as to selling the voucher.

The action of replevin is purely a possessory action, and if the plaintiff, at the time of instituting his suit, was not absolutely entitled to the possession of the property he must fail. Therefore, the direction of the court to the jury to bring in a verdict for the defendant was correct.

ENOCH TOTTEN,
Attorney for Defendant in Error.

Law R 71 Eqth 299
25 Md 267
109 U.S. Law Ed Book 330
15 Mem - 408 -
2 Pan Com - 642. Thus